IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 18-08-2006

CORAM

THE HONOURABLE MR.JUSTICE K. MOHAN RAM

C.M.A.No.1174 of 1999

S.Syed Masthan by his
power agent Saharvan Beevi .. Petitioner/Plaintiff

Versus

Syed Mubarak
son of Mohamed
4/19 East Street
Azhiyur, rep by his
power agent Ammona Begum
w/o syed Mubarak .. Respondent/Defendant

Prayer: This Civil Miscellaneous Appeal has been filed against the order and decree dated 29.4.1999 made in A.S.No.49/1999 on the file of the Additional Subordinate Judge, Nagapattinam, setting aside the order of the learned District Munsif, Nagapattinam, made in I.A.No.65/90 in O.S.No.144/1981 dated 24.9.1997.

For petitioner : Mr. D.Ravichandran for
Mr.T.R.Rajaraman

For Respondent : Mr. Srinath Sridevan

ORDER

Being aggrieved by the order of remand dated 29.4.99 made in A.S.49/99 on the file of the Additional Subordinate Court, Nagapattinam, the respondent before the lower appellate Court, who is the plaintiff in O.S.No.144/81 on the file District Munsif Court, Nagapattinam, has filed this appeal.

2. The brief facts leading to the filing of this appeal are as follows:

i) Originally the plaintiff filed O.S.No.144/81 on the file of the District Munsif Court, Nagapattinam seeking partition and separate possession of his 5/12 share in the suit properties. The appellant and the respondent are brothers. The trial Court passed the preliminary decree dated 20.10.1981 granting ¼ share to the appellant herein. Pursuant to the same, the appellant herein filed I.A.No.65/90 in O.S.No.144/81 before the District Musnif Court, Nagapattinam for appointment of an Advocate Commissioner to divide

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the property and to allot his ¼ share as per the preliminary decree and to pass the final decree. The respondent herein contested the said application contending that the appellant herein had filed an application for passing of final decree, but the same was not prosecuted and hence, the present application is not maintainable. The trial Court appointed an Advocate Commissioner, who after inspecting the suit properties with the assistance of the Taluk Surveyor, filed his report and rough sketch and the plan prepared by the Taluk Surveyor and also the valuation report and plan of the Assistant Engineer, PWD, Nagapattinam relating to the suit properties.

ii) In the Commissioner's report, he has referred to the instructions given by the counsel for the plaintiff as well as the counsel for the respondent herein. The plaintiff by his instructions had requested the Commissioner to divide the suit properties and allot ¼ share to him and the respondent in his written instructions, given through his counsel, had requested the Advocate Commissioner to find as to whether the suit property can be divided in to three shares to enable convenient enjoyment of the suit properties. Accordingly, the Advocate Commissioner after coming to the conclusion that it is not possible to divide the suit properties into four shares, divided the suit properties into three shares and allotted the Northern (yellow coloured in the sketch) portion of the suit properties towards the plaintiff's ¼th share and suggested the payment of an amount of Rs.5,067/- as ovalty to the defendant/respondent herein. The respondent herein filed the objections to the commissioner's report.

iii) After considering the above said documents filed by the commissioner and the objections filed by the respondent herein, the trial Court accepted the suggestions of the Advocate Commissioner and passed the final decree allotting the northern yellow coloured portion in the advocate commissioner's report towards ¼th share of the plaintiff and directed the plaintiff to pay a sum of Rs.5,067/- as ovalty to the defendant/respondent. Being aggrieved by that order, the defendant/respondent filed A.S.No.49/1999 before the Additional Sub-Court, Nagapattinam. The defendant/respondent herein contended before the lower appellant Court that more extent of land is available and contrary to the extent mentioned in the preliminary decree more land has been allotted to the plaintiff/appellant herein towards his ¼th share and the value of the property has not been properly fixed.

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iv) The lower appellate Court framed the following points for consideration :

a) Where, the order of the lower court, allotting particular portion in the suit property for the plaintiff respondent's share is incorrect?

b) Whether the matter will be remanded for fresh allotment of property in the final

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decree proceedings for partition as requested by the appellant/defendant?

The lower appellate Court has pointed out that the measurement of the suit property on East-West is 46 links and on North-South is 28 links as per the description of property in the decree, but as per the commissioner's report and plan the length of the suit property on East-West is 275 links and on North-South is 46 links, therefore, there are discrepancies in the measurement of the property. It further observed that the allotment made is not legally correct and the valuation of the allotted property is not legally correct. On those grounds the lower appellate Court held that the order of the trial Court allotting the properties towards the share of the parties is not correct. For the said reasons, the final decree passed by the trial Court was set aside by the lower appellate Court. It is observed by the lower appellant Court that it is impossible to allot correct extent in the suit property without ascertaining the suit property from the property mentioned in the Commissioner's report. The lower appellate Court opined that the division cannot be done without identifying the suit property and on that ground, came to the conclusion that it is proper to remand the matter for fresh consideration and disposal by the trial Court.

3. Heard the learned counsel for the appellant/plaintiff as well as the learned counsel for the respondent/defendant.

4. The learned counsel for the appellant submits that the remand order passed by the lower appellate Court is unsustainable in law for the reasons that there is no reason to remand the matter back to the trial Court, since all the necessary documents, evidences and materials are available before the lower appellate Court. It is further submitted by the learned counsel for the appellant that the lower appellate Court ought to have considered those materials and disposed of the the appeal itself, considering the fact that the suit is of the year 1981.

5. The learned counsel for the respondent submits that the suit property has not been properly measured and there is discrepancy in the measurement of the property by the Advocate Commissioner and the same has been pointed out by the lower appellate Court, therefore, the order of remand is in order.

6. The learned counsel for the appellant in support of his contention relied on the principle laid down in the decision of a Division Bench of this Court reported in 2005(2) MLJ 552 (S.Sanmugham Vs. S.Sundaram and others). In the said decision, the honourable Division Bench after referring the decisions reported in 2002(2) SCC 686 (P.Purushottam Reddy Vs. Pratap Steels Limited), AIR 1965 SC 364 (Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati), 2002 (3) MLJ 704 (Palanisamy @ Uthayarpalayanthan Vs. Apparsamy) and 2002 (2) MLJ 100 (M/s Sekaran Real Estates, A partnership firm, by

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Managing partner K.Chandrasekaran Vs. Punjab National Bank, Mylapore branch, Madras), held as follows:

> "when the provisions under O.41, Rules 23 to 29 of C.P.C. are not a bar to take further evidence or to appoint a Commissioner, if so necessary, and to try the appeal, as rightly pointed out by the learned counsel for the appellant, we are of the view that there is no necessity to remand the matter back to the trial Court and that the lower appellate Court itself can try the matter after taking further evidence as to the point to be decided and it can dispose of the appeal on merits and in accordance with law."

The learned counsel for the appellant firmly submits that the above principle is squarely applicable to the facts of the case on hand. He further submits that the lower appellate Court could itself have considered as to whether the Advocate Commissioner has not valued the suit property properly.

7. Admittedly the Advocate Commissioner has filed his report with his rough sketch. The taluk surveyor's report and the valuation report and plan of the Assistant Engineer, PWD, relating the suit properties are also available on record. The lower appellate Court could have very will considered those documents and disposed of the appeal by itself instead of remanding the same to the trial Court. Even if the lower appellate Court has found any discrepancy in the report of the Commissioner or the report of the Assistant Engineer, PWD relating to the valuation of the suit property, it could have exercised it's power under O.41 Rules 23 to 29 to take further evidence or to appoint an Advocate Commissioner, if so necessary. The lower appellate Court should have taken note of the fact that the suit is of the year 1981 and it is pending for more than twenty years and all the relevant materials are available on record and disposed of the appeal itself instead of remanding it to the trial Court. In the light of the above discussion, the order passed by the lower appellate court is to be set aside and accordingly the same is set aside.

8. In the result, the civil miscellaneous appeal is allowed and the order dated 29.4.1999 passed in A.S.No.49/1999 on the file of the Additional Subordinate Judge, Nagapattinam is set aside. The

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Additional Subordinate Judge, Nagapattinam, is directed to dispose of the appeal in A.S.No.49/1999 within three months from the date of receipt of a copy of this order. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ssv

To

1.The Additional Subordinate Judge,
Nagapattinam.

2.The District Munsif, Nagapattinam.

3.The Record Keeper, VR Section,
High Court, Madras.

+1cc to Mr.T.R.Rajaraman, Advocate Sr 37146
+1cc to M/s. Srinath Sridevan, Advocate Sr 37251

GM (CO)
km/17.10.

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